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Materials for

RACE AND CULTURAL DIFFERENCE

(Bridge Week No. 2, November 17 - 21, 1997)

Faculty of Law

University of Toronto

compiled and edited by

Prof. Craig Scott

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RACE AND CULTURAL DIFFERENCE

Fall 1997

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Suggested Reading Strategies: This Bridge covers quite a bit of terrain and there is a considerable amount of reading. The following are two suggestions of reading strategies that some students may wish to consider. The first strategy is first to read the cases covered during the week; they are Nanabush v. Deer, Morin, R.D.S. (all three judgments), Vriend, Trinity Western University v. BCCT, Parks and Williams. The idea would be for you to read these cases, reflecting on them based on your current knowledge and intuitions. Then, once you have read the cases, you can begin to read the secondary literature that is designed to challenge you to reflect critically on the kinds of issues raised by these cases. By doing the readings in this order, you read the theory in light of the cases, and, in the process, get a chance to see if your views on the merits of cases are modified as a result of the perspectives in these other readings. This approach also has the virtue of allowing you to read the theoretical and other contextual readings with more of a sense of purpose (i.e. better understanding the issues in, and nuances of, the cases). A second strategy would be to read the cases having had at least some initial exposure to background theory such that your initial reading of the cases will be more reflective than it might otherwise be. If you were to choose this route, you might want first to read the readings under "Introductory Readings for the Entire Bridge" and then go on to the cases; you would then begin to make your way through other readings. At minimum, you should ideally try to have pursued one or the other of these two strategies before the Bridge week begins on Monday afternoon, November 17.

Note that, by and large, the Bridge week sessions are not structured around session leaders presenting the readings in any detail, although style will vary; rather, the sessions are primarily designed to take off from the readings in a way that maximises discussion amongst participants and students.

In order to be prepared for the assignment, it is crucial that you have reflected on each of the above-mentioned cases; the assignment will be handed out at the end of the last session of the Bridge. You will have a choice from at least three questions except for those doing an overlap assignment in Prof. Roach's Criminal Law class in which case the choice is limited to two questions.

INTRODUCTORY READINGS FOR THE ENTIRE BRIDGE

"Manifestations of Racism -- The Aboriginal Peoples of Canada & Black Canadians" in Frances Henry, Carol Tator, Winston Mattis and Tim Rees, The Colour of Democracy: Racism in Canadian Society 1

Canadian Bar Association, Task Force on Gender Equality in the Legal Profession, Touchstones for Change: Equality, Diversity and Accountability 5

Nitya Iyer, "Part I. -- Categories, Similarity, and Difference" from "Categorical Denials: Equality Rights and the Shaping of Social Identity" 10

"Racism in Justice: Understanding Systemic Racism", Chapter 3 of Margaret Gittens, David Cole, Toni Williams, Sri-Guggan Sri-Skanda-Rajah, Moy Tam, and Ed Ratushny, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System 15

Teun A. van Dijk, "Educational Discourse" in Elite Discourse and Racism 21

Kimberlé Crenshaw, "Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law" in Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., Critical Race Theory: The Key Writings That Formed the Movement 23

Martha Minow, "Foreword: Justice Engendered" (1987) 101 Harvard Law Review 10 25

Peggy McIntosh, "White Privilege and Male Privilege: A Personal Account of Coming to See Correspondence Through Work in Women's Studies" 29

Adrienne Shadd, "Institutionalized Racism and Canadian History: Notes of a Black Canadian" in Ormond McKague, ed., Racism in Canada 36

S. James Anaya, "On Justifying Special Ethnic Group Rights: Comment on Pogge" in Ian Shapiro and Will Kymlicka, eds., Ethnicity and Group Rights 38

Jacob T. Levy, "Classifying Cultural Rights" in Ian Shapiro and Will Kymlicka, eds., Ethnicity and Group Rights 41

K. Anthony Appiah, "The Multiculturalist Misunderstanding" (Oct. 9, 1997) New York Review of Books 46

MONDAY AFTERNOON (NOVEMBER 17)

GENERAL READINGS FOR ENTIRE AFTERNOON

Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, "Stage One: Separate Worlds" (October 1996) [henceforth, "Report of RCAP"] 51

Statement by the Gitwangak Chiefs, 1884, in Don Monet and Sakau'u (Ardythe Wilson), eds., Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case 53

Report of RCAP: Looking Forward, Looking Back, Extract on Delgamuukw v. British Columbia 54

Michael Jackson, "The Case in Context" in Colonialism on Trial 56

Robert Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 58

WHOSE SOVEREIGNTY? ABORIGINAL/NON-ABORIGINAL DIALOGUES (John Borrows)

Richard Delgado, "Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative" in Delgado, ed., Critical Race Theory: The Cutting Edge 60

The Royal Proclamation of 1763 62

John Borrows, "Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation" 63

Nanabush v. Deer, Wolf et al. in John Borrows, "With or Without You: First Nations Law (in Canada)" 84

LEARNING FROM ABORIGINAL APPROACHES TO CRIMINAL JUSTICE (John Borrows and Kent Roach)

Kent Roach, "Aboriginal People", in Due Process and Victim's Rights: The New Law and Politics of Criminal Justice 89

R. v. Morin (1995), 101 C.C.C. (3d) 124 102

ss. 718 - 719, Criminal Code 113

Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in Gosse, Henderson, and Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made At a Conference on Aboriginal Peoples and Justice* 114

TUESDAY MORNING (NOVEMBER 18)

THE R.D.S. CASE AND BEYOND: A CONVERSATION ON RACISM AND IMPARTIALITY IN THE JUDICIARY (April Burey, Wesley Crichlow, Avvy Go, Jennifer Nedelsky, and Michelle Williams)

Katherine Swinton, "Judicial Neutrality and Social Context Education" 119

Maryka Omatsu, "The Fiction of Judicial Impartiality" 123

Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." 126

Report of the Nova Scotia Advisory Group on Race Relations (Halifax: Sept. 1, 1991) 135

R. v. R.D.S. (Judge Sparks, Oral Reasons) 141

R. v. R.D.S. (Judge Sparks, Written Supplementary Reasons) 145

Jennifer Nedelsky, "Judgement, Diversity and Relational Autonomy" 150

R. v R.D.S. (Supreme Court of Canada) 160

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CULTURAL GROUPS AND INTERNAL MINORITIES (Leslie Green and Denise Réaume)

Denise Réaume, "Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation" 175

Leslie Green, "Internal Minorities and Their Rights" in Will Kymlicka, ed., The Rights of Minority Cultures (Oxford: OUP, 1995) 101 185

Duncan Hood, "Teacher's 'sacred' ceremony scorned: Religious freedom may shield Catholics from discrimination charge" 193

Facts from R. v. Vriend 194

Trinity Western University v. British Columbia College of Teachers 196

Hoddy Allan, "The fight for the minds of children: Do parents have the right to stop schools from teaching 'immoral' equality?" 202

SOURCES OF CHANGE FOR CULTURAL AND RELIGIOUS NORMS: THE SITUATION OF WOMEN IN MALAYSIA AND INDIA (Maznah Mohamad and Chandrakala Padia)

Abdullahi Ahmed An-Na'im, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" 203

WEDNESDAY AFTERNOON (NOVEMBER 19)

ROUND TABLE DISCUSSION: DISCRIMINATION IN JURY DELIBERATION (Steve Hinkson, Wes Marsden, Shaun Nakatsuru, Kent Roach, and Julian Roy)

ss. 626 - 644, Criminal Code 209

Extracts on Jury Selection from M.L. Friedland and K. Roach, Cases and Materials on Criminal Law and Procedure, 8th ed. 212

R v Parks 217

Miriam Henry and Frances Henry, "A Challenge to Discriminatory Justice: The Parks Decision in Perspective" 223

R v Williams 225

Kent Roach, "Aboriginal People -- Jury Selection", in Due Process and Victim's Rights: The New Law and Politics of Criminal Justice 228

Note, "Jury Selection Simulation" 230

RCAP, Bridging the Cultural Divide (1996) in Friedland and Roach 231

Tanya Coke, "Lady Justice May Be Blind, But Is She a Soul Sister?" 233

THURSDAY MORNING (NOVEMBER 20)

LIVING MULTIPLICITY (Irshad Manji and Mary Anne Meloche)

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Irshad Manji, *risking utopia: on the edge of a new democracy* 242

Walter L. Williams, *The Spirit and the Flesh: Sexual Diversity in American Indian Culture* 252

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Canadian Bar Association, Task Force on Gender Equality in the Legal Profession, Touchstones for Change: Equality, Diversity and Accountability 259